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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 575

UNITY RAILWAYS COMPANY, a Corporation,
Petitioner,

v.

ANNA KURIMSKY, Administratrix of the Estate of
Stephen J. Kurimsky, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Unity Railways Company, a corporation, respectfully prays that a writ of certiorari be issued to review the judgment entered in this case on November 10, 1947 by the Supreme Court of Pennsylvania by which that Court affirmed a judgment of the Court of Common Pleas of Allegheny County, Pennsylvania, which judgment affirmed a judgment in favor of the respondent and against your petitioner in the sum of Twenty-five Thousand ($25,000) Dollars.

JURISDICTION.

(a) Opinion of the Court Below.

The opinion of the Supreme Court of Pennsylvania is reported as *Anna Kurimsky, Administratrix of the Estate of Stephen J. Kurimsky, v. Unity Railways Company, a corporation,* 357 Pa. 521.

(b) Jurisdiction of This Court.

Said decision of the Supreme Court of Pennsylvania was entered on November 10, 1947 (R. 6 b). A petition for reargument was filed in due course but was denied on November 18, 1947 (R. 20 b). It is believed that this Court has jurisdiction to review the decision upon writ of certiorari under the provision of Section 237 of the Judicial Code, as amended (U.S.C.A. Title 28, 2nd Sec. 344), which provides as follows:

> "(b) It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority

exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review or a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

This case deals with the interpretation of the Federal Employers' Liability Act U.S.C. Section 51, et seq., 35 Stat. 65 (1908), 53 Stat. 1404 (1939), 45 U.S.C.A. Section 51 (1943).

QUESTIONS PRESENTED.

(1) Where an employee of a railroad company engaged in interstate commerce is killed during a shuttle operation, is the administratrix entitled to have her case submitted to a jury where the evidence fails to disclose any negligence on the part of the railroad company and where the evidence also fails to show that any negligence in the operation of the train was the cause of the employee's death?

(2) Where a case under the Federal Employees Liability Act is submitted to a jury and the jury returns a verdict in favor of the deceased employee's administratrix, should the verdict be allowed to stand where the inferences or conclusion drawn by the jury are unreasonable?

STATEMENT OF THE MATTER INVOLVED.

Prior to November 30, 1944 your petitioner was the owner of and operator of a small railroad company which was built to handle the coal output from mines located at Renton, Plum Township, Pennsylvania. The petitioner obtains coal cars from various railroad companies at interchanges, takes the empty coal cars to Renton where the coal is loaded and the cars are then returned to the interchanges, being loaded and returned to the connecting railroads.

The trackage of the petitioner consists of four miles of main track, one mile of branch line main track and about three miles of sidings. One of the interchange points, which is the interchange for the Bessemer and Lake Erie Railroad is at Unity Junction.

In 1924 Stephen J. Kurimsky started to work with the petitioner as a laborer and later became and at the time of his death was Supervisor of Tracks and he also acted as a brakeman.

On November 30, 1944 Stephen J. Kurimsky was acting as a member of the crew of a train as the fireman wished to go hunting and he was working as an extra brakeman. At about 6:30 P. M. on November 30, 1944 Stephen J. Kurimsky was killed during a switching operation of empty cars. Suit was instituted in the Court of Common Pleas of Allegheny County, Pennsylvania, by Anna Kurimsky, Administratrix of the Estate, under the provisions of the Federal Employer's Liability Act 45, U. S. C. Section 51, et sec, and under the provisions of the Act of 1907, Commonwealth of Pennsylvania, being the Act of June 10th, P. L. 523, section 172. There was no evidence of any violation of the safety

appliance Act or any other Act of Congress or any evidence of any violation of any regulation of the Interstate Commerce Commission. The only evidence as produced by the respondent was for the purpose of showing negligence in the operation of the train by a change in orders during the shifting operation without notice to the deceased, Stephen J. Kurimsky, and to show that the negligence caused his death.

This is not a case of conflicting evidence or inferences. This is a case of complete absence of probative facts to support the verdict of the jury as to negligence and more particularly as to proximate cause.

Practically all of the testimony in the case was offered by the respondent. This testimony was presented by the President of the petitioner and all of the remaining members of the train crew. The only testimony offered by the petitioner was to clarify and reiterate certain testimony in the respondent's case. The sum total of all of the testimony is that there is no testimony to show what was the cause of Stephen J. Kurimsky's death.

The facts concerning this accident are not in dispute and there is no real conflict of testimony. The operation of the train is best described by reference to plan marked Exhibit "A" and other plan attached (see appendix).

This accident occurred in the following manner, the point of accident being near the cross-over switch of the petitioner and the Bessemer and Lake Erie Railroad. At this point the tracks of both railroads extend in a north and south direction, the Bessemer and Lake Erie Railroad tracks being west of the petitioner's tracks. The most easterly track of the petitioner was

the main track. West of the main track was No. 1 sidetrack connecting with the main track at No. 1 switch. West of No. 1 sidetrack was No. 2 sidetrack, which connected with the main track at No. 2 switch at a point 98 ft. 8 in. north of No. 1 switch. At a point 54 ft. north of No. 2 switch was a switch called "Unity Crossover Switch" where a connecting track ran to the north bound Bessemer track.

At the time of the accident defendant's crew was made up of Keister, conductor; Walton, engineer; Frank Kurimsky, fireman; Kitsko, brakeman; Binkley, flagman; and Stephen Kurimsky, extra brakeman.

The following measurements are important. The locomotive and tender are together sixty-seven feet six inches long. Each hopper car is thirty-one feet five inches long. So the locomotive, tender and seven hoppers are together two hundred eighty-seven feet five inches long, to which should be added about six inches for each coupling, or about three feet. The caboose was about thirty feet long. The whole train, therefore, with the caboose attached, was about three hundred and twenty feet long and without the caboose it was two hundred ninety feet long. When the hopper doors are open there is a clearance of five and seven-eighths inches above the top of the rail, when the hopper doors are closed the clearance is seven and seven-eighths inches, but all hopper doors were open at the time of this accident.

At the start of the operations, which was for the purpose of moving seven empty hopper cars from No. 2 track to No. 1 track, the locomotive was on the Unity main track headed northwardly in the vicinity of the scale house. At this time the caboose was attached to

the front or northerly end of the locomotive. The order was given to Stephen J. Kurimsky by the conductor that "we'll get in on No. 2 and catch them seven small hoppers and set them over to No. 1 track". The engineer, Walton, therefore, backed into No. 2 track to pick up the seven hopper cars and on this southward movement of the locomotive and caboose Stephen J. Kurimsky rode on the steps at the north end of the caboose. Kurimsky dropped off opposite the No. 1 switch and walked over to that switch while Walton, the engineer, was bumping in the seven hoppers and making automatic coupling on No. 2 track. Stephen Kurimsky then walked northwardly to No. 2 switch in order to throw it after the cars had been pulled out of No. 2 track. Keister, the conductor, then threw the Unity cross-over switch located fifty-four feet north of No. 2 switch and then walked northwardly to the vicinity of the water tank close to the track leading to the northbound Bessemer and Lake Erie main track. The locomotive pulled the seven hopper cars out of No. 2 track through No. 2 switch and went over the cross-over on to the northbound Bessemer main track and came to a stop, or almost to a stop, with the front of the caboose at the point marked "X" on Exhibit "A" (see appendix), just near the south end of the scales. Keister, the conductor, called to Binkley, the flagman, while the train was on this north movement, to cut off the caboose. The train was proceeding at a speed estimated between four and ten miles per hour. After the train had come to a complete stop at the point just indicated Stephen J. Krimsky gave a lantern signal from switch No. 2, which was observed by Keister, who was then one hundred fifty to one hundred sixty feet north of switch No. 2, and Keister relayed the back-up signal to Walton, the engineer. It is agreed by all of the witnesses that

Stephen J. Kurimsky was last seen alive at No. 2 switch four or five feet east of the main track when he gave the back-up signal with his lantern. There is not one iota of testimony as to what Stephen J. Kurimsky did after he gave the back-up signal as above indicated. There is no testimony as to when he got on the train —if he did—or where he got on the train or where he fell off the train or how he got under the train or what caused him to fall or to get under the train. The Trial Court in its opinion states the facts as follows: (240 a)

> "Nobody really knew much about what actually did happen to cause Kurimsky's death".

After the train had backed up not more than one and one-half car lengths southwardly from the extreme north position in which it had stopped pursuant to order from Keister the train came to a complete momentary stop or almost to a stop. The testimony here is that there was some jerk or jolt caused by this stopping. The purpose of this stop was to cut off the caboose and was no different from numerous other stops.

As above described nothing was seen or heard from Stephen J. Kurimsky until after the train had been moved from its extreme northerly position where the lead car of the train was about forty-five feet south of No. 2 switch when the caboose had been completely cut off. The train moved southwardly into No. 1 track and came to rest with the front of the locomotive at the point marked "W" on Exhibit "A", this point being approximately one hundred sixty feet south of No. 1 switch. When Stephen J. Kurimsky did not appear to cut off the locomotive when it came to a stop at this position one hundred sixty feet south of No. 1 switch, search was made and his body was discovered under

the rear end of the locomotive between the third and fourth driving wheels with one leg projecting out over the easterly rail between the two driving wheels. The lantern, however, was found between the rails of the No. 1 track about forty feet south of No. 1 switch where the letter "L" has been placed on Exhibit "A". The only blood marks which were found were on the south end of the tender and on the wheels of the first and second cars from the tender and the hopper doors at the north end of the second car.

From the above review of the facts, which facts are stated in accordance with the testimony introduced by the plaintiff, it is readily apparent that there has been shown no negligence on the part of the defendant and that there is not one iota of testimony that even if an inference of negligence might arise, this negligence was the proximate cause of the death of Stephen J. Kurimsky.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

All of the facts necessary to the decision on petition of the respondent for writ of certiorari have been set forth in the statement of the matter involved.

The Trial Judge in his opinion stated as follows: (240 a)

> "Nobody really knew much about what actually did happen to cause Kurimsky's death."

In our opinion this is an overstatement. The fact is that none of the witnesses, who were all of the members of the train crew, knew what caused the death.

It is, of course, incumbent upon the respondent to prove negligence and further prove that the negligence was the proximate cause of Stephen J. Kurimsky's death. In *Toledo, St. Louis & Western Railroad Company v. Allen,* 276 U. S. 165, Mr. Justice Butler stated the rule as follows:

(p. 168)

"The plaintiff can not recover in the absence of negligence on the part of the defendant. Seaboard Air Line v. Harton, 233 U. S. 492, 502."

To the same effect is the case of *Gunning v. Cooley,* 281 U. S. 90, where the Court in its opinion by Mr. Justice Butler held:

(p. 94)

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the parties producing it, upon whom the onus of proof is imposed.' Citing Improvement Co. v. Munson, 14 Wall 442, Pleasants v. Fant, 22 Wall 116.

* * * * * * *

"Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory in[illegible]ion to the jury. Peoples Savings Bank v. Ba[illegible] U. S. 556. So. Pac. v. Pool, 160 U. S. 438. 'W[illegible]re a plaintiff produces

evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.' Ewing v. Goode (Taft) 78 Fed. 442. See Patton v. Texas & Pacific Ry., 179 U. S. 658. New York Central v. Ambrose, 280 U. S. 486."

The Supreme Court of the United States in several recent cases, one of which is *Tennant, Admrx. v. Peoria & Pekin Union Railway Co.*, 321 U. S. 29, in an opinion by Mr. Justice Murphy said:

(p. 32)

"In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67. *Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.'* Galloway v. United States, 319 U. S. 372, 395; Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors." (Italics ours)

It will be noted in this case that the evidence showed and the case was sustained in favor of the claimant by reason of violation of the Railroad Company's rule re-

quiring ringing of an engine bell. The opinion on this distinction is as follows:

> "Tennant was employed by the defendant railroad company as a switchman in its yards. The evidence supported a fact finding that Tennant was killed by being run over by one of defendant's trains at a point where it was within his duty to be; that the engineer who operated the train had seen him before the train motion began, in a position with respect to the engine that was consistent with the performance by him of his duty in that respect and in that place; that the company rule required the ringing of a bell before such a train movement for the benefit of the members of the crew; and that the bell was not rung."

In the recent case of *Lavender v. Kurn,* 327 U. S. 645; 66 U. S. Supr. Ct. Rep. 740, Mr. Justice Murphy held that the scope of review on appeal was as follows: (p. 744)

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to disregard or disbelieve whatever facts are inconsistent with its conclusion."

In *Tiller v. Atlantic Coast Line,* 318 U. S. 54, the Court held as follows:

> "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury."

Ellis v. Union Pacific Railroad Co., 329 U. S. 649, 91 L. E. 434, 67 S. C. 599 (1947), Mr. Justice Douglas, L. 653:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must 'be in whole or in part' the cause of the injury. 45 U. S. C. § 51 Brady v. Southern R. Co., 320 U. S. 476, 484. Whether those standards are satisfied is a federal question, the rights created being federal rights. Brady v. Southern R. Co., supra; Bailey v. Central Vermont R. Co., 319 U. S. 350."

Of course, it is the position of your petitioner that this case should never have been submitted to a jury, that the Court should have granted defendant's motion for judgment of compulsory non-suit and that, therefore, the Trial Court having wrongfully submitted the case to the jury in the first instance, the mere fact that the jury returned a verdict in favor of the plaintiff does not improve the respondent's position. If there never was any evidence of negligence or proximate cause, the mere fact that the jury decided there was negligence and that this negligence was the proximate cause of the death would not improve the respondent's position.

In this connection we would like to call the Court's attention to the recent case of *Julia Eckenrode, Admin-*

istratrix of the Estate of John Eckenrode, deceased, appellant, v. Pennsylvania Railroad Company, CCA 3rd 1947 (not yet reported), where the Court reviewed the evidence and found that there was no evidence of negligence even though the jury had returned a verdict in favor of the plaintiff.

Even under the rules expressed in *Tennant v. P. & P. Union Ry. Co., supra,* and *Lavender v. Kurn, supra,* the circumstantial evidence must be entirely consistent with the cause of death. That is not the situation here. The only evidence remotely suggesting negligence was that relating to the cutting off of the caboose. Under all the evidence it is perfectly obvious that if Stephen J. Kurimsky did board the south end of the lead car he was all right long after that car had passed No. 2 switch and, therefore, could not have been caused to fall from the train by any motion of the train at the time the caboose was cut off.

Even though the evidence as to the movement and motion of the train was all oral and while the witnesses did not agree precisely as to the exact point where the train moved or stopped, there is no doubt from the evidence that the following are the facts concerning the accident, and the review of these facts clearly shows that the decision of the jury was so unreasonable that the verdict should not be allowed to stand. The facts are in accord from the eye witnesses that Stephen J. Kurimsky got off at No. 1 switch and threw the switch while the locomotive moved into No. 2 sidetrack where it automatically coupled onto the seven empty cars (36 a and 56 a). The seven cars were pulled out of No. 2 sidetrack onto the Unity main track and thence over the crossover to the northbound Bessemer main track. When this northerly movement ended the northern end

of the caboose was substantially opposite the south end of the Unity scales, shown on the map, Exhibit "A". In the meantime Stephen J. Kurimsky moved northwardly from No. 1 switch to the No. 2 switch. When the train cleared No. 2 switch Stephen J. Kurimsky threw it so that the cars would proceed along the main track to and into No. 1 sidetrack. He then gave a backup signal with his lantern and the signal was relayed by Keister, the conductor, to the engineer, as the engineer could not see Stephen J. Kurimsky because of the curve in the track and his vision was blocked by the train. The engineer started to back the train but before he had moved any appreciable distance immediately got a signal from the conductor to stop in order to cut off the caboose, and the entire movement of the train was not more than two car lengths (152 a), which would be about sixty feet. From a review of the plan it is apparent that the front of the caboose stopped at the point marked "X", Exhibit "A", and the south end of the southerly car on the train would be substantially half way from No. 2 switch to Unity crossover switch. It is also readily apparent that since the train moved only two car lengths from its extreme northerly position the lead car of the train was only about forty-five feet south of No. 2 switch when the caboose had been completely cut off. Also from the testimony it is apparent that the train moved southwardly in the No. 1 track and came to rest with the front of the locomotive at the point marked "W", Exhibit "A" (Walton 65 a), this point being approximately one hundred sixty feet south of No. 1 switch. After throwing No. 2 switch the next duty to be performed by Steve Kurimsky was to disconnect the locomotive from the seven hopper cars. This is stated by all the witnesses (Walton, 39 a; Keister, 83 a; Binkley, 171 a), even including Frank Kurimsky

(153 a). In order to get to the point where the cars would be disconnected from the locomotive Steve could either walk from No. 2 switch or ride at any point on the train (42 a) but it is logical to assume that if he rode he would mount the train at a point near where the uncoupling was to take place, to wit, between the tender and the most northerly hopper car. When the train had come to rest on No. 1 track and Steve did not appear to cut off the locomotive a search for him was made by Mr. Keister and Mr. Binkley. They went completely around the train, first passing down between the main track and No. 1 track and then up between No. 1 track and No. 2 track and then around the front or northerly end of the locomotive. They then discovered Steve's body under the rear end of the locomotive between the third and fourth driving wheels with one leg projecting out over the easterly rail between those two driving wheels (Walton, 46 a-68 a; Keister, 83 a; Binkley, 160 a and 169 a). His lantern, however, was found between the rails of No. 1 track, about forty feet south of No. 1 switch, where the letter "L" has been placed on Exhibit "A" (Keister, 63 a-65 a, 85 a-86 a and 110 a). Binkley (110 a) stated that the lantern was found about two car lengths in front of the locomotive and about fifty feet from No. 1 switch (174 a). It seems obvious, therefore, that whatever happened to Steve happened to him some place south of No. 1 switch. It could not have been the movement of the train connected with cutting off the caboose which disturbed him since the south end of the train was only a short distance south of No. 2 switch when the cutting off of the caboose had been completed. Moreover, the blood marks found on the south end of the tender (Keister, 86 a, 106 a and 107 a) and on the wheels of the first and second cars from the tender and on the hopper doors at the north end of the second car,

all indicate that in some way Steve got under only the north end of the second car and that the first car, tender and the extreme rear of the locomotive then passed over him. There were no marks on any of the hopper doors south of the front hoppers of the second car although all of the hopper doors were open (87 a, 89 a, and 108 a).

Under the above quoted evidence it is perfectly obvious that if Kurimsky did board the train it must have been at the south end of the second car from the locomotive. It is, therefore, readily apparent that the verdict of the jury was so unreasonable from the evidence that it should not be allowed to stand. All of the facts above mentioned are consistent only with the inference that Stephen J. Kurimsky boarded the train at the south end of the second car and that he fell for some reason, perhaps on account of the weather conditions existing at the time, through the hopper doors at the south end of the second car from the locomotive and thus came in contact with the hopper doors and wheels at the north end of that car and the hopper doors and wheels of the car next to the locomotive and with the footboard on the end of the tender. It is also readily apparent that Kurimsky did board the south end of the second car from the locomotive and that this could have occurred only long after the caboose had been cut off, and from the evidence at the time the caboose was cut off this car was in the vicinity of the water tank shown on the plan about one hundred sixty feet north of the point where Stephen J. Kurimsky was last seen alive. It is, therefore, the position of your petitioner that there is no evidence of negligence on the part of the defendant, no evidence that any act of the petitioner caused Stephen J. Kurimsky's death, and that the verdict of the jury is so unreasonable that it cannot be sustained.

Conclusion.

For the reasons hereinabove stated the petitioner submits a review by your Honorable Court of the decision in this case by the Court below is fully justified and it respectfully requests the issuance of a Writ of Certiorari to review said decision.

J. ROY DICKIE,

Attorney for Petitioner.